5-28-2013

Renshaw v. Mortgage Electronic Registration Systems Respondent's Brief Dckt. 40512-2012

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY RENSHAW,

Appellant,

vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Respondent.

RESPONDENT'S OPENING BRIEF

Supreme Court Docket Number 40512-2012
Ada County Docket No. 2010-23898

Appeal from the District Court of the Fourth Judicial District for Ada County.

Appeal from the Honorable Deborah A. Bail, District Judge, presiding.

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STATEMENT OF ISSUES ON APPEAL

Whether the district court properly awarded summary judgment to Respondent Mortgage Electronic Registration Systems, Inc. ("MERS"), where: (1) Plaintiff and Appellant Gregory Renshaw's ("Appellant") claims fail as a matter of law under this Court's recent *Trotter* and *Edwards* decisions; and (2) all requirements for non-judicial foreclosure were met under I.C. §§ 45-1505 and 45-1506.

STATEMENT OF THE CASE

A. Nature of Case

After defaulting on his residential home loan, Appellant brought this lawsuit in an attempt to prevent non-judicial foreclosure.

B. Course of Proceedings and Disposition Below

Appellant filed his complaint on December 6, 2010 in the Ada County district court. (Clerk's Record on Appeal ("R._") at R.15-R.100.) Named as defendants were MERS, Colonial First Lending Group, Inc., Homecomings Financial, LLC ("Homecomings"), and Executive Trustee Services, LLC ("ETS"). (R.15) Seeking to stop the non-judicial sale scheduled for December 12, 2010, Appellant alleged fifteen causes of action. (R.23-31.)

The trustee's sale scheduled for December 29, 2010 did not occur and was not rescheduled. (R.1021.) Appellant filed his First Amended Complaint on February 15, 2011. (R.123.) The First Amended Complaint alleged negligence, tortious interference with contract, wrongful foreclosure, slander of title, fraud, unjust enrichment, acting in concert, violations of

the Idaho Consumer Protection Act, and "aiding and abetting" causes of action against MERS. (R.136-R.142.)

Homecomings, MERS, and ETS filed a Motion for Judgment on the Pleadings. (R.261.) On August 3, 2011, the trial court issued its Memorandum Decision and Order on Defendants' Motion to Dismiss or for Summary Judgment. (R.261-R.270.) The trial court dismissed Appellant's causes of action for tortious interference with contract, wrongful foreclosure, slander of title, fraud, unjust enrichment, aiding and abetting, and a cause of action asserted under the Home Affordable Modification Program. *Id.*

Defendants Homecomings, MERS, and ETS filed their answer on March 10, 2011. (R.243.) On December 13, 2011, all claims against defendant Colonial First Lending Group, Inc. were dismissed with prejudice pursuant to a joint stipulation. (R.271-R.273.)

On March 21, 2012, Homecomings, MERS and ETS filed their motion for summary judgment. (R.1015.) Appellant filed his Motion for Partial Summary Judgment on April 11, 2012. (R.1193.) On or about May 16, 2012, Homecomings and ETS filed a notice of bankruptcy and effect of automatic stay. (R.1746-R.1747.)

On July 23, 2012, the trial court entered its Decision and Order regarding Summary judgment. (R.2025-R.2034.) The district court concluded that "Suffice it to say that this record does not contain any facts which would invalidate the note or deed of trust and which would give rise to a cause of action against the lender's nominee and beneficiary, MERS" and dismissed the action against MERS. (R.2032.)

On September 6, 2012, Appellant moved for reconsideration of the summary judgment order. (R.3282.) After receiving additional briefing from the parties (R.3282-R.3388), and oral argument, the district court issued a written order denying reconsideration on October 16, 2012. (R.3389-R.3393.) The district court noted that "Even if the Court were to take judicial notice of all material submitted throughout this entire case and gave the plaintiff the benefit of all favorable inferences on all of the evidence submitted as it did in the Summary Judgment Decision, the plaintiff has failed to come forward with any cognizable claim under Idaho law which would warrant damages against MERS." (R.3389.)

Judgment was entered in favor of MERS on October 16, 2012. (R.3394-3395.) On November 27, 2012, Appellant, through his trial counsel, filed a notice of appeal (R.3396-3408.) Appellant filed his opening brief on April 2nd, 2013.

C. Statement of Facts

1. Appellant's Mortgage Loan

On June 27, 2007, Appellant executed a promissory note in favor of his lender, Homecomings (the "Note"). (R.1019 at ¶2 & R.1023-R.1029; *see also* R.128 at ¶ 33.) Appellant promised to make monthly payments of principal and interest in the amount of $1,476.56 in order to pay off the loan from Homecomings in the amount of $236,250.00. (R.1023 at ¶¶ 1 and 3.) The note provides that if Appellant does not pay the full amount of each monthly payment on the date it is due, he will be in default. (R.1026 at ¶ 7(B).) The note also expressly provides that the "Lender may transfer this Note." (R.1024 at ¶ 1.)

On June 27, 2007, Appellant also executed a deed of trust securing his obligation under the Note the ("Deed of Trust"). (*See* R.128 at ¶ 33.) The Deed of Trust was recorded in the office of the Ada County, Idaho, Recorder on July 3, 2007 as Instrument No. 107095032. (R.1036 at ¶2; R.1039-R.1062.) The Deed of Trust encumbers a piece of real property located in Ada County, Idaho, commonly known as 3480 South Pimmit Place, Boise, Idaho 83706 (the "Property"). (R.1040-1054.)

The Deed of Trust designates Appellant as borrower, Homecomings as lender, Pioneer Title Company of Ada County ("Pioneer") as trustee, and ***MERS as beneficiary acting solely as a nominee for lender and lender's successors and assigns***. (R.1040-R.1042) (emphasis added).

Appellant agreed that the Deed of Trust secured his repayment of the loan and his covenants and agreements in the Deed of Trust and the Note. (R.1042.) Among other covenants and agreements, the Deed of Trust provides that Appellant "shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note." (R.1043 at ¶ 1.)

In the Deed of Trust, Appellant agreed that "MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclosure and sell the Property ...." (R.1042.)

The Deed of Trust further provides as follows:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times ***without prior notice to Borrower***. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing.

(R.1050-R.1051 at ¶ 20) (emphasis added).

At closing, Appellant initialed each page of the Deed of Trust, including the page referring to MERS, and signed the Deed of Trust, which was then acknowledged by a Notary. (R.1039-R.1062.) After origination of the loan, Homecomings transferred the Note to Residential Funding Company, LLC ("Residential Funding") of which Homecomings is a direct subsidiary. (R.1019 at ¶4.) Thereafter, Residential Funding Company sold the beneficial interest in the loan to Federal Home Loan Mortgage Corporation ("Freddie Mac"). *Id.*. Homecomings, Residential Funding, and Freddie Mac are all members of MERS. *Id.*

Presently, the Note is indorsed in blank and held by GMAC Mortgage, LLC ("GMACM"), who services the loan for Freddie Mac. (R.1020 at ¶5 & R.1023-R.1029.) Freddie Mac is the master servicer and owns the beneficial interest in Appellant's loan as an investor, but GMACM is the "holder" of the Note - a bearer instrument. *See id.* GMACM is a member of MERS, and certain GMACM employees are signing or certifying officers of MERS, with authorization to take action in MERS's name. (R.1020 at ¶ 6.)

Homecomings was the servicer of Appellant's loan until July 1, 2009. (R.1019 at ¶ 4 & R.1020 at ¶7.) As of July 1, 2009, GMACM became the servicer of Appellant's loan, although the address to which Appellant was to send payments did not change. (R.1020 at ¶7.) On June 10, 2009, Homecomings and GMACM memorialized a forthcoming change in servicing by sending Appellant a letter, by first class mail, notifying him of the change in accordance with the requirements of the Deed of Trust. (*See* R.1020 at ¶7 & R.1030-R.1031.)

2. Appellant's Default and the Resulting Foreclosure

Upon receiving the loan, Appellant commenced making periodic payments to Homecomings, and then GMACM, through approximately April 2010. (R.1020 at ¶¶ 7-8.)

Appellant failed to make his monthly payment in May 2010 and in the months thereafter. (R.1020 at ¶ 8.) Such failure was a default under the terms of the Note and Deed of Trust.

As a result, ETS, as attorney in fact for the trustee, Pioneer, executed and recorded a Notice of Default and Election to Sell Under Deed of Trust ("Notice of Default") in the office of the Ada County Recorder as Instrument No. 110074820 on August 13, 2010. (R.1064-1066.) ETS' action was authorized by a Limited Power of Attorney ("Power of Attorney"), recorded on December 1, 2008, in the office of the Ada County Recorder as Instrument No. 108128542. (R.1067-R.1069.)

Appellant was served with the Notice of Default and the Notice of Trustee's sale in August 2010. (R.130 at ¶50.) On December 6, 2010, Appellant commenced this lawsuit. The scheduled Trustee's Sale did not occur on December 29, 2010 and was not rescheduled. (R.1021 at ¶ 11.) Appellant's loan remains in default. *See id.*

3. MERS and the MERS® System

a. Title Problems Prior to MERS

At origination of a residential mortgage loan, a borrower executes a promissory note (obligating the borrower to repay the loan) and a separate security instrument (granting a security interest in the real estate as collateral in the event of default on the note). *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011). Unlike the note, the security instrument—typically a mortgage or, as in this case, a deed of trust—is recorded in the county in which the property is located pursuant to state law. *Id.*; *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 490-91 (Minn. 2009).

After origination, lenders routinely sell mortgage loans on the secondary mortgage market and such loans may be sold several times in whole or in part or bundled into mortgage-backed securities. *Cervantes*, 656 F.3d at 1038-39; *Jackson*, 770 N.W.2d at 490. The lender that owns the note has the right to receive repayment of the underlying indebtedness and ultimately the sale proceeds in the event of a default and foreclosure of the security instrument. *Cervantes*, 656 F.3d at 1038. In addition, the contractual right to service the loan for the lender routinely changes hands. *Id.* After origination, the loan "servicer" deals directly with the borrower and administers the loan (e.g., collects payments from the borrower, ensures that real estate taxes and insurance premiums are paid, and remits payments to the owner(s) of the note). *Id.*; *see also* R.K. Arnold, *Yes, There Is Life On MERS*, 11 PROB. & PROP. 32, 34 (1997). Pursuant to UCC requirements for negotiable instruments, notes are negotiated either by endorsement and delivery, or in the event the note is bearer paper, just by delivery, *Horvath v. Bank of N.Y., N.A.*,

641 F.3d 617, 621 (4th Cir. 2011); Idaho Stat. §§ 28-3-201, 3-204, 3-205, while assignments of servicing rights typically occur by contract, *see* R.K. Arnold, supra, at 34.

Transfers of notes and assignments of servicing rights are not susceptible to recording in county land records. *See id.* Historically, transfer (i.e., negotiation) of a note to a new lender often, but not always, was accompanied by a separate assignment of the trust deed (substituting a new beneficiary) that was recorded in the county land records. *Cervantes*, 656 F.3d at 1039; *Jackson*, 770 N.W.2d at 490. But as secondary market transfers increased, "[t]his recording process became cumbersome to the mortgage industry," *Cervantes*, 656 F.3d at 1039, because "multiple assignments of the security instrument commonly caused confusion, delays, and chain-of-title problems," *Jackson*, 770 N.W.2d at 490. These problems were exacerbated in the 1980s due to the inability to obtain assignments, satisfactions, and reconveyances from collapsed S&Ls.[1] MERS was formed in the aftermath of the S&L crisis, *Jackson*, 770 N.W.2d at 490, to eliminate the foregoing title problems and inefficiencies, which adversely affected the residential finance industry's ability to efficiently provide home financing to consumers. *Id.*; *Cervantes*, 656 F.3d at 1039

b. Role and Benefit of MERS

MERS does not originate, lend, service, or invest in home loans. *Cervantes*, 656 F.3d at 1039-40. Instead, MERS serves two primary functions for the residential lending industry. First,

[1] *See, e.g.,* Jeffrey J. Miller, *The Effect of the S&L Bailout on Title to Real Property*, 5 PROB. & PROP. 44, 47-49 (1991) (discussing various title-related issues with S&Ls in the 1980s); R.K. Arnold, *supra*, at 34 (discussing delays); *see also* Allen H. Jones, *Setting the Record Straight on MERS,* Mortg. Banking 34 (May 2011).

MERSCORP Holdings, Inc., ("MERSCORP") operates the MERS® System, an electronic database that tracks transfers of promissory notes (and changes in loan servicers), *Cervantes*, 656 F.3d at 1038, by a Mortgage Identification Number ("MIN") assigned to each loan, *Jackson*, 770 N.W.2d at 490-91.[2] The shareholders of MERSCORP and the members of the MERS® System include lenders who originate, invest in, or service loans, *Cervantes*, 656 F.3d at 1039 (citing *Jackson*, 770 N.W.2d at 490-91), including government sponsored enterprises Fannie Mae and Freddie Mac. *See MERSCORP, Inc. v. Romaine*, 861 N.E. 2d 81, 83 n.2 (N.Y. 2006). Borrowers can learn the identity of the lender who owns their note (referred to on the MIN Summary as the "investor") and the servicer by calling the toll-free number listed in the trust deed (or mortgage) (*see, e.g.*, R.1041), or by accessing the MERS website, www.mersinc.org.[3] Prior to MERS, there was no system for tracking such interests, which are not reflected in county land records. *See* R.K. Arnold, supra, at 34.

Second, and wholly distinct from the MERS® System database, MERSCORP's subsidiary, Appellee MERS, acts as the "beneficiary" in the trust deed (or mortgagee in mortgage) as the agent (i.e. nominee) of the lender that owns the note and the lender's successors and assigns. *Cervantes*, 656 F.3d at 1040; *see, e.g.*, R.1039-R.1062 (Appellant's deed of trust). This is accomplished at origination, when the borrower and lender agree in the deed of trust (or

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[2] *See* R.K. Arnold, *supra*, at 34.

[3] Although the disclosure of the note owner is optional, 97% of the over 3,000 MERS members disclose their identity. *See, e.g., Problems in Mortgage Servicing From Modification to Foreclosure*: Hearing Before the Sub. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. (Nov. 16, 2010) (statement of R.K. Arnold, President and CEO, Mortgage Electronic Registration Systems, Inc.), http://banking.senate.gov.

mortgage)—including uniform deeds of trust (and mortgages) drafted by Fannie Mae and Freddie Mac—that MERS will serve this role. *See, e.g.*, R.1039-R.1062 (Appellant's deed of trust). These security instruments are recorded in the public land records identifying MERS as the holder of legal and record title to the security interest. *Jackson*, 770 N.W.2d at 490; *see also, e.g.*, R.1039-R.1062 – (Appellant's deed of trust as recorded in Ada County land records). With MERS' two distinct functions, subsequent transfers of notes (and assignments of servicing rights) are tracked in the MERS database, but are not recorded in the public land records, *Cervantes*, 656 F.3d at 1040, because notes are not susceptible to recordation. *See* R.K. Arnold, supra, at 34. When a note is transferred—i.e., negotiated (by endorsement and/or delivery) to a new lender—there is no separate assignment of the trust deed because there is no change in the beneficiary (or mortgagee) or holder of legal and record title. *Id.*; *Jackson*, 770 N.W.2d at 491 & n.2. Rather, MERS remains the trust deed beneficiary in the public land records on behalf of the new lender. *Cervantes*, 656 F.3d at 1040. These services MERS provides benefit lenders, borrowers, the title industry, and local governments in numerous ways, including, but not limited to: providing a source for information (e.g., promissory note transfers and loan ownership) not otherwise available; reducing recording errors and delays and the resulting uncertainty and title problems; and increasing efficiency and reducing costs.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews an order granting summary judgment de novo, applying the same standard the trial court used when ruling on the motion. *Sun Valley Potatoes v. Rosholt*, 133

Idaho 1, 3 (1999). Summary judgment may be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). The evidence is viewed in a light most favorable to the nonmoving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529 (1994). But a party opposing a motion for summary judgment may not rest on the allegations of the pleadings; they must set forth facts showing there is a genuine and material issue that remains to be tried. I.R.C.P. 56(e). "[T]he moving party is entitled to judgment where the non-moving party fails to set forth facts sufficient to establish the existence of an essential element to the non-moving party's case on which it will bear the burden of proof of trial." *Partout v. Harper,* 145 Idaho 683, 688 (2008).

The trial court's evidentiary rulings are reviewed for abuse of discretion. *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 696 (2004). To determine whether the court abused its discretion, this Court considers: "(1) whether it correctly perceived the issue as discretionary; (2) whether it acted without the boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason." *Id.*

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MERS IS A PROPER TRUST DEED BENEFICIARY

The issue of whether MERS can serve as the named beneficiary as nominee for the lender has recently been decided by this Court in *Edwards v. Mortgage Electronic Registration Systems*, 2013 Ida. LEXIS 135, 2013 Opinion No. 53 (Idaho Apr. 25, 2013). In *Edwards*, the Plaintiff (like Appellant in this case) claimed that MERS could not be the beneficiary unless it has an interest in the note that is secured by the deed of trust. *Edwards*, 2013 Ida. LEXIS 135, *4. Even though "[t]he deed of trust was not given for the benefit of MERS or to secure an obligation owing to MERS," this Court held the lender had the authority to designate an agent to act in its behalf, and the actions of its agents were equivalent to the actions of the lender. *Id.* at *11, *13-*14 ("Designating MERS as the beneficiary in its representative capacity as nominee of [the lender] and its successors and assigns was legally no different from designating [the lender] and its successors and assigns as the beneficiary"). Therefore, "***having MERS the named beneficiary as nominee for the lender conforms to the requirements of a deed of trust under Idaho law.***" *Id.* at *13 (emphasis added.) This Court's recent decision in *Edwards* completely forecloses Appellant's argument that MERS is required to have some type of financial interest in Appellant's note in order to qualify as a beneficiary under Idaho law.

Appellant also claims that MERS cannot "proceed" on behalf of the lender because MERS does not "possess" Appellant's note. Appellant's Brief at p. 20. As an initial matter, pursuant to Idaho Code § 45-1505, ***the trustee, not MERS*** initiates foreclosure. Therefore, even

assuming that MERS were required to "possess" the Note, this fact would not support any cause of action against MERS.

In any event, Appellant is simply incorrect regarding Idaho law. In *Trotter v. Bank of N.Y. Mellon*, this Court held that "pursuant to I.C. § 45-1505, a trustee may initiate nonjudicial foreclosure proceedings on a deed of trust without first proving ownership of the underlying note or demonstrating that the deed of trust beneficiary has requested or authorized the trustee to initiate those proceedings." *Trotter,* 152 Idaho 842, 847 (Idaho 2012); *see also Mortensen v. Mortgage Elec. Registration Sys.*, 2012 U.S. Dist. LEXIS 140933, 35-36 (D. Idaho Aug. 24, 2012) (holding that under *Trotter*, there is no requirement that the trustee produce the original "wet-ink" note and deed of trust to undertake a non-judicial foreclosure); *Purdy v. Aegis Wholesale Corp.*, 2012 U.S. Dist. LEXIS 140931 (D. Idaho Aug. 17, 2012) ("there is no duty to possess the note to initiate foreclosure proceedings under the Act"); *Hofhines v. BAC Home Loans Servicing, L.P.*, 2012 U.S. Dist. LEXIS 116085 (D. Idaho Aug. 15, 2012) ("the 'show me the note' requirement is not applicable to non-judicial foreclosure actions in Idaho").

Finally, Appellant argues that MERS is not the agent of the current holder of the Note. Appellant's Brief at p. 20. Appellant's claim is premised on a misrepresentation of the record. Paragraph 79 of the First Amended Complaint alleges that "MERS does not represent and is not the agent of the current holder of the Renshaw Note." (R.132.) In its answer, MERS stated "The allegations in paragraph 79 state legal conclusions to which no affirmative response is required. To the extent a response is required, Defendants admit MERS does not 'represent' the current holder of the Note and ***deny it is not the 'agent' of the same.***" (R.251 emphasis added.)

Accordingly, Appellant is simply incorrect in claiming that MERS admitted it was not an agent for the current holder of the note. Indeed, the party in physical possession of the note, GMACM, and the owner of the beneficial interest, Freddie Mac, are both MERS members. (R.1019-R.1020.) Similarly, all prior owners of the beneficial interest in the Note, Homecomings and Residential Funding, were also MERS Members. *Id.* Therefore, MERS was the agent of Freddie Mac and GMACM, as well as all prior owners of the Note.

III. MERS HAS COMPLIED WITH IDAHO CODE § 45-1505(1)

A. Idaho Code § 45-1505(1) Does Not Require Transfers Of Appellant's Note To Be Recorded

Idaho Code § 45-1505(1) requires assignments of the Deed of Trust to be recorded, but does not require the Note to be recorded. MERS has at all times been the beneficiary as nominee for the lender and the lender's successors and assigns. (R.1040-R.1042.) The Idaho Trust Deed Act does not define "assignments," but refers only to "assignments of the trust deed." Idaho Code § 45-1505(1). This statutory language suggests that the legislature was referring only to written assignments of the trust deed itself, not to a transfer or assignment of the underlying note as there is no mention in the statute that a transfer of the "promissory note," transfers of an "an interest in the promissory note," or transfers in the servicing rights must be recorded.

That makes sense: a promissory note is not a conveyance of real property and is not susceptible to recordation. *See McCray v. Twitchell*, 112 Idaho 787, 790 (1987) (deed of trust that lacked date was valid security for promissory note because the date of the deed of trust could readily be calculated from the terms of an unrecorded promissory note); *see also Cervantes v.*

Countrywide Home Loans, Inc., 656 F.3d 1034 (9th Cir. 2011) (when a note is transferred by endorsement and/or delivery to a new lender, there is no separate assignment of the deed of trust because there is no change in the beneficiary or holder of legal and record title); *Jackson v. Mortg. Elec. Registration Sys.*, 770 N.W.2d 487, 491 & n.2 (Minn. 2009).[4]

Further, a transfer by endorsement is not necessarily reflected in writing. The underlying debt obligation – the promissory note – is a negotiable instrument governed by contract law and Articles 3 and 9 of the Uniform Commercial Code. *See* Idaho Code §§ 28-3-101 to 28-3-605; Idaho Code §§ 28-9-101 to 28-9-628. In contrast, a deed of trust is a conveyance of an interest in real property that requires recording. *Spencer v. Jameson*, 147 Idaho 497, 501 (Idaho 2009) ("a deed of trust, by definition, is limited to the conveyance of real property") (citing Idaho Code § 45-1502(3)).

Nothing in Idaho Code § 45-1505(1) or any other provision in the Idaho Trust Deed Act requires the creation of a formal written assignment where none exists – but that is exactly what would be required if transfers of the note are deemed to "assignments of the trust deed" that must be recorded under Idaho Code § 45-1505(1). Recording interests in a promissory note would not serve the purpose of the recording statutes because the promissory note does not provide a description of the property and it does not transfer title to real property.

The purpose of recording is to protect third parties, such as subsequent *bona fide* purchasers or judgment creditors, by informing them there is an encumbrance on the real

[4] MERS' tracking of transfer of the notes provides benefits to lenders, borrowers, and the title industry by providing a source of information (*e.g.*, promissory note transfers and loan ownership) not otherwise available.

property. *See McCray*, 112 Idaho at 789-790. Thus, the primary objective of the recording statues is not to be an authoritative source for who owns beneficial interests, but to memorialize for the benefit of outside third parties the interests that affect ***title*** to real property. This is done by recording a single document – a conveyance of an interest in real property that is in the form of a deed of trust – with the county land title office.

Once the world is on notice, interested parties must investigate the status of the security interest in the real property. Because borrowers already know there is a security interest – having explicitly granted that interest – the recorded notice is ***not*** for the borrowers' benefit. Recording statues are ***not*** consumer protection statutes designed to confer rights on borrowers.

As the Minnesota Supreme Court held in *Jackson v. Mortgage Electronic Registration Systems.*, 770 N.W.2d 487, 498 (Minn. 2009), a mortgage of record does not lose legal title because there are transfers of interests in the promissory note. Instead, the *Jackson* court held that the transfer of a promissory note, which carries with it the security instrument, is not an assignment of legal title that must be recorded to foreclose by advertisement. *Id.* at 500-01; *but see Niday v. GMAC Mortg., LLC*, 251 Or. App. 278; 299-300, 284 P.3d 1157 (2012).

Appellant incorrectly claims that "[t]he trial court found that MERS' structure skirts Idaho law requiring the recording of the assignment of the deed of trust." Appellant's Brief at p. 21. In fact, the trial court actually stated, in response to Appellant's motion for reconsideration, that "[t]he MERS structure, **under the *Niday* analysis**, skirts Idaho law which requires the public recording of the assignment of the trust deed." (R.3391 (emphasis added).)

The Oregon Court of Appeals decision in *Niday v. GMAC* is distinguishable because the Oregon Court of Appeals determined that the "beneficiary" of the deed of trust for purposes of Oregon's Deed of Trust Act "is the person named or otherwise designated in the trust deed as the person to whom the secured obligation is owed," a holding that is directly contradicted by this Court's ruling in *Edwards*. *Compare Niday*, 251 Or. App. at 300-01 *with Edwards*, at 2013 Ida. LEXIS 135 *13-*14. Because Idaho law expressly recognizes that MERS may properly hold the beneficial interest as an agent for the lender, there is no reason to conclude that assignments of the promissory note need to be recorded as long as MERS is designated as the beneficiary and assignees of the note are MERS members. Moreover, on September 27, 2012, the Oregon Supreme Court also allowed a Petition for Review in *Niday*. *See Niday v. GMAC*, 352 Or. 454, 2012 Ore. LEXIS 674. Thus, *Niday* is not a final statement of Oregon law, and because the Oregon Supreme Court accepted the questions certified by Chief Judge Aiken on July 19, 2012 (*see Brandrup v. ReconTrust Co., N.A.*, Order Accepting Certified Question, 352 Or. 320, 287 P.3d 423 (2012)), the status of Oregon law on this matter remains unsettled.

Nor does MERS role as nominee for the lender cause any separation between the Note and the Deed of Trust. MERS was party to the original loan transaction and the Note and Deed of Trust were executed contemporaneously as part of that single transaction. Thus, as the Ninth Circuit recognized, the note and deed of trust are not "irreparably split" because at all times

MERS remained the agent of the lender and its successors and assigns. *Cervantes*, 656 F.3d at 1044.[5]

In sum, when a note is transferred whether by assignment or negotiated via endorsement and delivery to a new holder, there is no separate assignment of the deed of trust because there is no change in the beneficiary or holder of legal and record title. *Cervantes*, 656 F.3d at 1040; *Jackson*, 770 N.W.2d at 481 n.2. Instead, MERS remains the deed of trust beneficiary in the county land and title records on behalf of the new holder or lender. *Cervantes*, 656 F.3d at 1060. Accordingly, as long as MERS is designated as the beneficiary under the Deed of Trust, it is not necessary for each transfer or assignment of the Note to be recorded.

B. Appellant's Claim That MERS Failed To Comply With Idaho Code § 45-1505(1) Is Moot Because The Foreclosure Sale Was Abandoned

Even assuming that Idaho Code § 45-1505(1) requires assignments of the Note to be recorded prior to commencing foreclosure, no foreclosure sale occurred in this case. (R.1021 at ¶11.) Thus, even if the execution or recording of documents to initiate foreclosure proceedings were somehow procedurally defective (which they were not), Appellant cannot demonstrate any issue of fact regarding whether he has incurred any damages caused by the procedural defects of

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[5] *See also Cordero v. America's Wholesale Lender*, 2012 U.S. Dist. LEXIS 148695 (D. Idaho Oct. 15, 2012) (Rejecting plaintiff's "split the note" theory and noting "MERS is acting as the nominee, or agent, of the Lender, which as explained above is what [plaintiff] expressly agreed to"); *Van Kirk v. Bank of Am. Corp.*, 2012 U.S. Dist. LEXIS 143289 (D. Idaho Oct. 1, 2012) ("The fact that MERS is identified as the beneficiary under the Deed of Trust for the benefit of the lender, its successors and assigns, does not create a split between the Note and the Deed of Trust. The Deed of Trust follows the Note, and the agency relationship remains for subsequent parties to whom the note is properly assigned"); *Hofhines v. BAC Home Loans Servicing, L.P.*, 2012 U.S. Dist. LEXIS 116079, *20 (D. Idaho June 1, 2012) (finding no split when the deed of trust explicitly states that MERS is acting as nominee for the lender).

an abandoned foreclosure (as opposed to Appellant's default itself). As other jurisdictions have recognized, "it is well established that, when a non-judicial foreclosure sale is rescinded, 'any claims premised on the nonjudicial foreclosure are rendered moot.'" *Vettrus v. Bank of America, N.A.*, 2012 U.S. Dist. LEXIS 162442, *10 (D. Or. November 6, 2012) (quoting *Thomas v. OneWest Bank, FSB*, 2012 U.S. Dist. LEXIS 78628, *6-*7 (D. Or. June 4, 2012)).

In light of Appellant's failure to demonstrate any damages, the district court properly awarded summary judgment to MERS because, as the district court stated, "[i]t is not the naming of MERS as beneficiary which caused any harm to the plaintiff." (R.3392); *see also e.g., Dbsi/Tri V P'ship v. P'ship v Bender*, 130 Idaho 796, 809 (1997) (affirming district court's award of summary judgment when the plaintiff had not identified any damages).

IV. No Material Issue Of Fact Exists With Respect To Appellant's Causes Of Action Against MERS

A. Negligence

A cause of action for negligence requires a plaintiff to demonstrate "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." *Black Canyon Racquetball v. First. Nat'l*, 119 Idaho 171, 175-76, 804 P.2d 900, 904-05 (1991).

Appellant has entirely failed to demonstrate how these elements exist with respect to MERS. Appellant simply identifies, in the vaguest of terms, several acts that he believes constitute a breach of duty.

First, Appellant claims that MERS has "breached the contract in its failure to disclose that it has no recognized substantive or financial interest in Appellant's DOT." Appellant's Brief at p. 23. Appellant fails to identify the contract or the contractual provision wherein MERS promised to make such a disclosure. Further, this argument appears to confuse negligence and breach of contract causes of action. *Just's v. Arrington Constr. Co.*, 99 Idaho 462, 468 (Idaho 1978) ("negligent conduct and breach of contract are two distinct theories of recovery"). Indeed, "Under Idaho law it is settled that an alleged failure to perform a contractual obligation is not actionable in tort. . . . 'To found an action in tort, there must be a breach of duty apart from the nonperformance of a contract.'" *Carroll v. United Steelworkers*, 107 Idaho 717, 719 (Idaho 1984) (quoting *Taylor v. Herbold*, 94 Idaho 133, 483 P.2d 664 (1971)). In any event, MERS role was accurately described and disclosed to Appellant in his Deed of Trust; "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." (R.1041.)

Appellant also claims that MERS is "required by its own Rule 8 to record in Ada County, Idaho the assignment of its interest to the last lender prior to commencing a non-judicial foreclosure..." Appellant's Brief at p. 23. Appellant does not claim or present evidence that he is a member of MERS or that he is otherwise entitled to enforce MERS Rules of Membership. More fundamentally, any breach of MERS Rules of Membership would not constitute the basis for a negligence claim. *Carroll*, 107 Idaho at 719. In any event, even if Appellant could enforce MERS Rules of Membership, at the time of his foreclosure in 2010 the MERS Rules of

Membership did not require the recording of an assignment prior to initiating foreclosure. (*See* R. 2807 at 47:17-49:16.)

Appellant also contends that MERS knowingly violated Idaho Code § 45-1505(1), which mandates that any assignments of the Deed of Trust be recorded prior to commencing foreclosure. (Appellant's Brief at p. 20.) As discussed above, MERS actions with regard to the Idaho Trust Deed Act were proper. Moreover, the foreclosure sale did not occur. Accordingly, Appellant has no damages for any supposed violation of the Idaho Trust Deed Act.

Appellant complains that MERS "relies upon 'certifying officers,' which MERS knows are robo-signers." Appellant's Brief at p. 23. Appellant has left it to the reader's imagination which documents related to Appellant were improperly authorized or signed, thereby failing to demonstrate any issue of material fact. As this court stated in *Edwards*:

> "If Plaintiff contends . . . that documents may have been improperly signed, or that the notarization process was fraudulent, she should have put into the record admissible evidence supporting such assertions. She did not. In her argument, she simply recites the allegations in her amended complaint, but allegations in a pleading are not sufficient to create a genuine issue of material fact.

Edwards, at *20. More importantly, there is no legal support for Appellant's theory that the supposed "robo-signing" breached a duty that was owed, *by MERS, to Appellant*. Indeed, even if Appellant could demonstrate a material issue of fact regarding his "robo-signing" claim, such allegations would be more susceptible to a fraud allegation, not negligence.[6]

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[6] Allegations regarding "robo-signing" in support of a fraud claim are frequently alleged in borrower litigation and are frequently dismissed at the pleadings stage. *See, e.g. Gilbert v. Bank of Am. Corp.*, 2012 U.S. Dist. LEXIS 140930 (D. Idaho Sept. 26, 2012) (dismissing claims of "robo-signing" related to fraud allegation); *Homeyer v. Bank of Am., N.A.*, 2012 U.S. Dist.

Appellant also complains that MERS breached its obligation to comply with the Real Estate Settlement Procedures Act by its failure to adequately respond to Appellant's QWRs. Appellant's Brief at p. 23. Here, Appellant completely misrepresents his allegations. He alleges that on October 15, 2010 and November 11, 2010, he made two qualified written requests ("QWRs") that were not answered by *Homecomings*. (R.141.) Appellant has not claimed that MERS failed to respond to QWRs or that there any requirement for MERS to respond to QWRs. The reason is straight-forward and the law is clear here. MERS is not the servicer of Appellant's loan. MERS has, therefore, no obligation to respond to QWRs. *See* 12 USCS § 2605(e)(1)(A) (obligation of *servicer* of federally related mortgage loan to respond to qualified written request).

Finally, Appellant points to MERS supposed violation of the Home Affordable Loan Modification Guidelines due to the denial of Appellant's three separate applications for a home loan modification. *See* Appellant's Brief at p. 23. There are several fatal defects to Appellant's claims. First, Homecomings denied Appellant's applications, not MERS. Second, this cause of action was never asserted against MERS. (R.142-R.143 (alleging violation of HAMP as to Homecomings).) As a result, Appellant cannot explain how a supposed violation of the Home Affordable Loan Modification Program ***by Homecomings***, supports a cause of action for negligence ***against MERS***.

LEXIS 134026 (D. Idaho Aug. 27, 2012) (same); *Williams v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 113707 (D. Idaho Aug. 10, 2012) (same); *Van Kirk v. Bank of Am. Corp.*, 2012 U.S. Dist. LEXIS 116093 (D. Idaho Aug. 15, 2012) (dismissing RICO claim based upon allegations of "robo-signing").

B. Idaho Consumer Protection Act

Appellant cannot assert a claim under the Idaho Consumer Protection Act ("ICPA") because this case does not involve debts that arise out of the sale of goods and services. The Idaho Supreme Court has found that debts arising from the sale of goods and services are subject to the ICPA but ***other debts are not covered***. *In re Western Acceptance Corp Inc.*, 117 Idaho 399, 401 (1990) (emphasis added). The loan that forms the basis of Appellant claims is not a debt that arose out of the sale of goods or services and is, therefore, not covered under the ICPA. *See Cordero v. America's Wholesale Lender*, 2012 U.S. Dist. LEXIS 148695, *26 (D. Idaho Oct. 15, 2012) (dismissing consumer protection act based on MERS role as beneficiary because "the Complaint involves a secured transaction, not a debt that arose out of the sale of goods or services").

In addition, Appellant has not identified any specific action of MERS that constitutes a violation of the ICPA, or how that violation damaged Appellant.[7] Indeed, Appellant's entire argument with regard to the ICPA claim is the vague statement that "[t]he complexity of the incestuous relationship, the undisclosed conflicts, the violations of Idaho law set forth above are intended to and do create confusion, mislead, are false, and are deceptive." Appellant's Brief at p. 23.

[7] The trial court originally dismissed Appellant's claims under the ICPA to the extent such claims were related to the original loan documents and origination of the loan, because the two year statute of limitations precludes such claims. (R.268.) Appellant does not appeal that determination.

Appellant's conclusory statement regarding the ICPA falls far short of the standard required to present an argument on appeal. "When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered. . . . A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Stapleton v. Jack Cushman Drilling*, 291 P.3d 418, 426 (Idaho 2012) (*quoting State v. Zichko*, 129 Idaho 259, 263, (1996)). Appellant fails to present any authority or argument regarding the ICPA claim and the district court's grant of summary judgment in favor of MERS should be affirmed.

V. MERS, Not Appellant, Is Entitled To Its Fees And Costs On Appeal

Contrary to Appellant's assertions, MERS, not Appellant, is entitled to its fees and costs on appeal pursuant to I.A.R. 40 and 41. Appellant's appeal lacks any merit and simply invites this Court to second guess the findings of the district court. Appellant has failed to provide any authority or argument on which to support reversal of the district court. In addition, Appellant has chosen to continue his appeal despite this Court's recent decision in *Edwards*, which, as discussed above, is dispositive on virtually all of Appellant's contentions in this appeal. In such circumstances, attorneys fees may be awarded under Idaho Code § 12-121 because "the appeal was brought or defended frivolously, unreasonably, or without foundation." *Bach v. Bagley*, 148 Idaho 784, 797 (2010) (*citing Crowley v. Critchfield*, 145 Idaho 509, 514 (Idaho 2007).)

In addition, the Deed of Trust contains an attorney's fees clause:

> If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the property and/or rights under the Security Instrument (such

> as proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations.... then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's security interest in the Property and rights under this Security Instrument, including ... paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this security instrument
>
> ...
>
> Any amounts disbursed by Lender under this Section 9 shall become additional debt of the borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower Requesting payment.

(R.1046-R.1047.) The Deed of Trust also provides that the Lender is entitled to collect reasonable attorneys' fees in connection with invoking the power of sale. (R.1052 at ¶22.)[8]

As specified in the Deed of Trust, a lawsuit that "that may significantly affect Lender's interest in the Property" entitles MERS to recover fees to defend such an action. Appellant's complaint sought to restrict "Lender's interest in the Property" by attempting to prevent MERS from functioning as nominee for the lender and the lender's successor's and assigns. Similarly, Appellant's lawsuit arises out of and relates to the trustee's invocation of the power of sale. Accordingly, the fee clause in the deed of trust applies to Appellant's claims, and MERS is entitled to its reasonable attorneys' fees on appeal.

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[8] Idaho law recognizes that attorney fees may recovered if authorized by statute or by express agreement of the parties. *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750 (Idaho 1981).

CONCLUSION

For the reasons stated herein, the district court's decision below should be affirmed in all respects.

Dated: May 24, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May 2013, I caused to be served a true and correct copy of the foregoing by the following method to:

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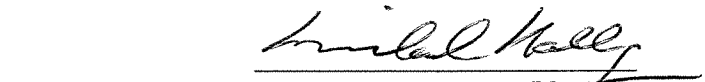

MICHAEL G. HALLIGAN, Attorney

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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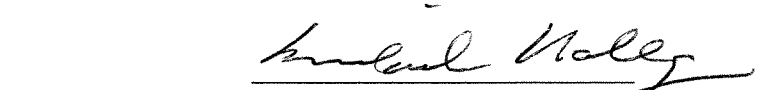

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